SUPREME COURT, U. S.

SEP 4 1971

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-228

TRANSIT CASUALTY COMPANY, ET AL.,
Petitioners,

vs.

SECURITY TRUST COMPANY, ET AL.,
Respondents.

BRIEF OF RESPONDENT SECURITY TRUST COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion here sought to be reviewed is reported at 441 F.2d 788. Its subsequent Order on Petition for Rehearing and Petition for Rehearing En Banc is unreported but reproduced as Appendix C to the petition for a writ of certiorari. The order of the United States District Court for the Southern District of Florida which was affirmed below is unreported but reproduced as Appendix A to the petition for a writ of certiorari. The foregoing opinions were rendered in the present Rule 60(b) proceedings.

Before the Rule 60(b) proceedings were commenced, there were prior opinions rendered and reported in the causes at 372 F.2d 441; 396 F.2d 803; and 399 F.2d 665, cert. den. 393 U.S. 1024.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The original opinion of the Court of Appeals is dated April 1, 1971. Petitioners' timely petition for rehearing was denied on May 28, 1971.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the district court's finding and holding that petitioners' motions for relief under Rule 60(b) were not timely filed when:

1. The motions were filed on July 1, 1969, and alleged a "typical case of mistake and nothing more" within the meaning of Rule 60(b)(1); and

2. The motions sought relief from prior dismissals of the causes without prejudice for failure to obey a court order which had the following procedural history:

   a. On July 12, 1967, the causes were dismissed with prejudice by the district court for failure to obey a court order;

   b. On appeal, the dismissals were affirmed but modified so as to be without prejudice. The Court of Appeals' original opinion was rendered on June 28, 1968; and its opinion on rehearing was rendered on August 29, 1968.

   c. On September 10, 1968, the district court entered an order dismissing the causes without prejudice in accordance with the appellate mandate.

   d. On January 13, 1969, this Court denied certiorari?

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 60 provides:

"(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should

have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT OF THE CASE

Petitioners, as plaintiffs below, filed two suits in the United States District Court for the Southern District of Florida (R. 12-75, 261-284)*. The complaints sought to recover damages from the respondent, Security Trust Company, because of the latter's alleged mismanagement

*"R" refers to the printed record used on both appeals in the Court of Appeals below. "A" refers to the printed Joint Appendix used in the second appeal below.

of McKinley & Company. McKinley & Company was alleged to have gone insolvent after entering into separate management agreements to act as manager for various insurers in the writing of certain types of insurance.

The named plaintiffs in each case were foreign insurance companies authorized to do business in Florida. In each case, plaintiffs sued "to their own use and to the use of" certain other insurers similarly situated (R. 12-13, 261-262). After some preliminary procedural sparring had occurred, the district court entered an order on September 14, 1966, which provided in pertinent part:

> "1. Plaintiffs shall within ten (10) days hereafter amend their complaints so as to include as parties Plaintiff all members of the alleged class who have retained counsel for the Plaintiffs to represent them in these two cases." (R. 179).

Events Leading Up To Order Of September 14, 1966

The events leading up to the order of September 14, 1966, are shown at R. 76-175. These events are fairly summarized in **Transit Casualty Company v. Atkins, (5th** Cir. 1967), 372 F.2d 441, 441442, where the Court of Appeals declined interlocutory review of the order, stating:

> "The facts underlying both of these proceedings are: The complaints were brought by two named parties plaintiff and seek damages against Security Trust Company, not only for themselves, but presumably for the benefit of 24 other insurance companies allegedly similarly situated.

The complaints did not state in what way the class members were so numerous that joinder of all was impracticable; nor was it alleged what questions of law or fact were common as between the defendant, Security Trust Company, and all the quasi plaintiffs; nor was it shown how a class action was superior to other available methods for the fair and efficient adjudication of the controversy. Security Trust, in its answers, specifically denied all allegations as to the alleged class claimed to be represented; denied that it was impracticable to bring all of the alleged members of the class before the court; and denied that the two party plaintiffs fairly represented the interests of the entire class. In the course of discovery, after answers were filed, the attorneys for Security communicated by letter with some of the 24 absent members of the alleged class seeking information as to their knowledge of having been named as members. The communications also concerned the taking of discovery depositions. Thereupon, the attorneys for the plaintiffs notified Security's counsel to cease and desist communicating directly or indirectly with the clients represented by them. They filed before the district judge a motion to enjoin and prohibit any such communication, and in that motion charged counsel for defendant with unethical conduct in attempting to communicate directly with the absent members of the class. Presented with a claim by the attorneys for the plaintiffs that the attorney-client relationship existed between them and the non-

party class members, and a charge of unethical conduct leveled at counsel for defendant, the Court had the problem of determining the jural relationship of the members of the class, not only to the plaintiffs but to each other, and to the subject matter of the litigation, as well as to the counsel for plaintiffs. In an apparent effort to assemble information to assist him in determining these relationships, the District Judge entered the order of September 14th. Plaintiffs argue that the writs should issue because the order requires the joinder of additional plaintiffs who are residents of the same state as the defendants, and that this will destroy diversity and will divest the federal court of jurisdiction.

Irrespective of the correctness of the order below, it is apparent that this case is not in an appropriate stage for appellate review. The District Court is in the middle of a housekeeping operation. It has not reached a determination of the merits in any respect, and the order here sought to be reviewed does not define the rights of any party. It is not clear what the precise effect of the order will be on the outcome of the litigation, nor what subsequent decree, either dismissing the case or permitting them to proceed as a class action, will define their rights. . . . "

District Court Proceeding After Denial of Interlocutory Appellate Review

After the Court of Appeals held it had no jurisdiction to review the interlocutory order, the district court granted petitioners additional time to comply with the order (R. 185-186). Finally, on May 9, 1967, petitioners amended their complaints in supposed compliance with the September 14th order, but merely added certain foreign corporations as named plaintiffs and named none of the Florida corporations they admittedly represented (R. 221-223). To add insult to injury, plaintiffs' counsel filed an affidavit to the effect that the Florida members of the class had "elected to remain in that capacity" (R. 228).

The Dismissal With Prejudice for Failure to Obey The Court's Order

The district court's Order of Dismissal provides in pertinent part as follows:

> " . . . 2. Notwithstanding the granting of two continuances to the plaintiffs to comply with the order of September 14, 1966, plaintiffs, in the opinion of this Court, have failed to comply therewith. The Amendment to the Complaint filed on May 9, 1967 in an effort to comply with the order of September 14, 1966, conspicuously fails to include three Florida corporations which the plaintiffs have represented to this Court, as well as the Appellate Court—the Fifth Circuit Court of Appeals—to comprise members of

the alleged class which must be named pursuant to the Order of September 14, 1966, since they were legally represented by counsel for the plaintiffs. As argued by counsel for the defendant, a failure to name these corporations constitutes a failure to comply with the order of September 14, 1966.

3. This Court expressly notes that at the time of the hearing on this motion no determination had been made as to whether this action is properly maintainable as a class action. In this regard, the posture of this case at the time of the hearing was the same as when the order of September 14, 1966 was entered. This Court, then, as now, as noted by the Fifth Circuit Court of Appeals, was engaged in a 'housekeeping' operation with a view to determining whether this action is properly maintainable as a class action. A full and good faith compliance with the order of September 14, 1966 was also necessary in order for this Court to determine the jural relationships of all interested parties among themselves as well as their relationship to the subject matter of the litigation and discovery processes incident thereto.

4. The Amendment together with counsel's affidavit of compliance does not respond to the Court's order of September 14, 1966 and instead of facilitating a disposition of the matters set forth in the complaint it serves to frustrate and hamper this Court's effort to resolve the pertinent issues.

5. The Court expressly finds that the plaintiffs have failed to comply with the order of September 14, 1966 as they were ordered to do. It Is Therefore, Ordered And Adjudged, that this cause be and the same is hereby dismissed with prejudice pursuant to Rule 41(b) and that the Defendant, Security Trust Co. go hence without day with its costs as may hereafter be taxed upon motion. . . . " (R. 229-231).

Court of Appeals' Ruling That Dismissal Should Be Without Prejudice

In its initial opinion at 396 F.2d 803, the Court of Appeals states:

". . . We agree with the order of dismissal by the district court, but vacate that part of the order making the dismissal with prejudice and remand with instructions to enter the order without prejudice."

In its Order on Petition for Rehearing at 399 F.2d 665, the Court of Appeals states:

" . . . For rehearing, appellants urge two principle points, both of which deal again with the merits or demerits of the District Court's order in attempting to define the parties to be included within the appellants' class action. Again appellants overlook that really the only issue on appeal is the compliance vel non with the District Court's order of September 14, 1966, and,

having found a failure of compliance on the part of appellants, the District Court's judgment of dismissal was affirmed with directions that the order be entered without prejudice as set out in our Per Curiam of June 28, 1968. This Court will not modify its previous ruling despite any Florida law claimed by appellants which may or may not bar a subsequent cause of action in any future suit. . . ."

Entry of Order On Mandate and Denial of Certiorari

The Court of Appeals' denial of the petition for rehearing on August 29, 1968, was followed on September 10, 1968, by the district court's entry of a dismissal without prejudice in accordance with the appellate mandate (A. 333-334). Thereafter, on January 13, 1969, this Court denied certiorari. 393 U.S. 1024.

Rule 60 Proceeding In District Court

On June 24, 1969, over six months after the Court's denial of certiorari, the Court of Appeals granted petitioners leave to file a Rule 60 motion stating:

"... However, the granting of this leave to file said motion is not to be construed for or against the merits of the plaintiffs' Rule 60 motion." (A. 338).

On July 1, 1969, petitioners filed their Rule 60 motion in the district court which was styled "Joint Motion for Plaintiffs and Class Members for Relief of Judg-

ments, Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure." (A. 340-345). In their joint motion, petitioners requested that the dismissal without prejudice be vacated so that dismissals without prejudice "and with leave to file amended complaints" could be entered (A. 345).

In Paragraph 7 of the Joint Motion, petitioners explained their failure to comply with the September 14th order and their grounds for vacating the prior dismissal without prejudice as follows:

> "7. The circumstances leading to the order of dismissal of July 12, 1967 involved the failure of plaintiffs to join as parties four Florida corporations whose joinder would have concomitantly destroyed diversity and federal jurisdiction. The failure to join the Florida companies arose from a bona fide misunderstanding of the order of September 14, 1966 and a procedural anomaly occasioned by the July 1, 1966 amendment to Rule 23 altering the character of these actions (which had originally been filed as class actions determinable from the face of the pleadings) so as to render them without classification until an order of Court, pursuant to Rule 23(c)(1) had been entered. The order of September 14 admits of two interpretations and the interpretation taken by counsel for the plaintiffs was that all members of the class were required to be joined as parties, pursuant to paragraph 1 of said order. The decharacterization effect of the July 1 amendment to Rule 23 was such that

> the amendment to the complaints, which counsel believed to be required by paragraph 1 of the September 14 order, would have defeated federal jurisdiction in a manner inconsistent with the applicable provisions of Rule 19 and 20. Thus, counsel in an attempt to preserve federal jurisdiction was caught in the cross-fire of confusion between Rule changes and an order of this Court which seemingly embraced elements of both the old and the amended Rule. . . . " (A. 342).

Two weeks later, petitioners' counsel filed a memorandum in support of the joint motion in which they expanded the grounds for relief by claiming that they had in fact complied with the September 14th order because they had actually not been "retained" by the Florida corporations they failed to name as plaintiffs (A. 353-356). As noted, **supra**, the district court found to the contrary when it entered the initial dismissal with prejudice (A. 229-231); and its finding in this respect was affirmed by the Court of Appeals on the prior appeal.

The prior findings that petitioners did not comply with the September 14th order could have come as no surprise since they had previously admitted that the order required them to name the Florida corporations as plaintiffs. Thus, petitioners' counsel admitted in the district court that:

> "Furthermore, three of the corporations that we do represent are Florida corporations. One of them is General Guaranty of Orlando. The full name of that corporation is General Guar-

> anty Insurance Company of Orlando. Three of the corporations that are Florida corporations that we represent are General Guaranty Insurance Company of Winter Park, Florida; American Fire and Casualty Company of Orlando; and Carolina Casualty Company of Jacksonville, Florida." (R. 253. Cf. 229-230).

Moreover, in their "Brief of Petitioner" before the Court of Appeals in the prior mandamus and prohibition proceedings, petitioners stated:

> "On September 14, 1966 the trial court sua sponte entered an order requiring that the complaint be amended so as to add as additional parties plaintiff all members of the class who have retained counsel for the plaintiffs to represent them in the case. (Exhibit C). It is undisputed that four (4) of the companies whose joinder would be required under this ruling are Florida corporations. (Exhibit F). The defendants likewise are Florida residents." (Brief For Petitioner, p. 2).

On November 19, 1969, the district court denied the Rule 60 motions as untimely filed (A. 448-450). The district court found that, "The pleadings indicate the typical case of mistake and nothing more." (A. 449). In finding and holding that the motions were untimely, the district court reasoned as follows:

> "Rule 60(b)(1) must be brought within a reasonable time not to exceed one year from the date of the order from which relief is sought. Plain-

tiff feels that the time should run from Order on Mandate dated September 10, 1968. It is asserted that the time runs from a substantive change in the order. The cases cited by Plaintiffs are not authoritative since they deal with the time limit for appeals. In fact, the case most strenuously urged by Plaintiff argues to the contrary result. Federal Trade Commission v. Minneapolis- Honeywell Regulater Company, 344 U.S. 206 (1952). The decision of the Fifth Circuit in the present case did cause a substantive change in that it reversed the dismissal 'with prejudice.' However, the aspect of the order that was so vitally important to Plaintiffs was the dismissal itself. The complaint remained dismissed. As far as Plaintiffs stood they remained as they were at the time of the July Dismissal Order. It cannot be said that in context this was a substantial modification. The Court is compelled to the conclusion that it is the July Dismissal Order that Plaintiff seeks relief from and the time limit must run from that date unaffected by the Order on Mandate.

A reasonable time is usually construed as the time allowed for appeal. McDowell v. Celebrezze, 210 F.2d 43 (5th Cir. 1962); 7 Moores Federal Practice, Para. 60.22[3] (2nd ed. 1955). However the prosecution of an appeal does not bar the application to the District Court for relief pursuant to Rule 60(b). Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955). Plaintiff should have sought relief in this Court within

one year of the Order of July 12, 1967. An appeal does not toll the one year time limit. Although the Petition for Rehearing had not been denied, the decision of the Fifth Circuit had been rendered leaving sufficient time to file the motion here under consideration which was filed July 1, 1969. It is therefore

Ordered and Adjudged that Plaintiffs' Motion for Relief Pursuant to Rule 60(b)(6) be treated as a motion pursuant to 60(b)(1) and as such be denied as being untimely filed. . . . " (A. 450).

Opinion of Court of Appeals Below

In affirming the district court, the Court of Appeals agreed "with the District Court that this is a typical case of mistake and nothing more." 441 F.2d at 792. Having so agreed, the Court of Appeals concurred in the district court's findings and holding that the motions were not filed within the one year period prescribed in Rule 60(b)(1) saying at 441 F.2d 791:

"Although plaintiffs appealed from the order of dismissal, such appeal does not toll the time for making a 60(b) motion. This is because such motion can be made even though an appeal has been taken and is pending. Corn v. Guam Coral Co., 318 F.2d 622 (9th Cir. 1963); Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955); 7 Moore, Federal Practice, § 60.28[2] (2d Ed. 1970). If the appeal results in a substantive change, then

the time would run from the substantially modified order entered on mandate of the appellate court. Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206, 72 S.Ct. 245, 97 L.Ed. 245 (1952). The decision of our Court on the appeal did not cause a substantive change in that the dismissal was merely changed to be without prejudice. As far as this suit was concerned, after the entry of the order on the mandate on September 10, 1968, the plaintiffs stood in the exact position as they did on July 12, 1967. As far as their claim was concerned, the appeal determined that the dismissal would not act as a bar to another suit in this or another forum, but as to pursuing the cause of action in this suit, the complaint remained dismissed. Changing a dismissal with prejudice to a dismissal without prejudice is not such a substantial substantive change as to renew the right of plaintiffs to bring a motion for relief under Rule 60(b), F.R. Civ.P., or extend their time for filing such a motion.

The District Court correctly held that the time for bringing the 60(b) motion for relief from the dismissal of the complaint began on July 12, 1967."

REASONS FOR DENYING THE WRIT

1. Petitioners concede at page 22 of their petition that there is no decision in conflict with the holding below that the Rule 60(b)(1) one year time period was not tolled by the subsequent appellate proceedings. What little authority there is, is in accord with the holding below. **Corn v. Guam Coral Company** (9th Cir. 1963), 318 F.2d 622, 629; **Nyssonen v. Bendix Corporation** (1st Cir. 1966), 356 F.2d 193, cert.den. 385 U.S. 846; 7 Moore's Federal Practice, § 60.28(2), p. 320, fn. 37.

2. The decision below is correct and in probable accord with this Court's prior decisions. See, **Federal Trade Commission v. Minneapolis-Honeywell R. Co.**, 344 U.S. 206.

3. Since both courts below found and held that petitioners' motions presented a typical case of mistake and nothing more, the record raises no issue concerning what result should obtain when a motion for relief also presents "any other reason" within the meaning of Rule 60(b)(6). Indeed, the concluding paragraph of the Court of Appeals opinion below states:

> "Nevertheless, the District Court further considered whether any other reasons brought plaintiffs within the broad equitable power of Rule 60(b)(6), which could be invoked to prevent extreme hardship or injustice. Barron & Holtzoff (Wright Edition) § 1330, p. 426 (1958). The Court determined that 'the situation here is not the type that justifies such an extreme

exercise of discretion.' Our review of the record reveals no other reasons which would compel the court to exercise its discretion in granting relief or would show any abuse of discretion in denying relief." 441 F.2d at 792.

4. Even if petitioners' motions are treated as arising under Rule 60(b)(6), it is clear that they were not made "within a reasonable time". The motions were made two years after the original dismissal; more than a year after the Court of Appeals' first opinion on appeal; and six months after this Court's denial of certiorari. During the entire time, the only thing that happened was that petitioners were told again and again by one court after another that their cases were properly dismissed for failure to obey a court order. Cf. **Goldfine v. United States** (1st Cir. 1964), 326 F.2d 456; **McDowell v. Celebrezze** (5th Cir. 1962), 310 F.2d 43; 7 Moore's Federal Practice, § 60.22(3), p. 238.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33, true copies of the foregoing were mailed on this ____ day of September, 1971, to the following counsel of record:

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